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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Colusa)

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGG THOMAS DAVIS,

Defendant and Appellant.

C062442

(Super. Ct. No.
CR47892)

This is an appeal pursuant to *People v. Wende* (1979)
25 Cal.3d 436 (*Wende*).

On January 31, 2007, defendant Gregg Thomas Davis transported about three ounces of marijuana in a vehicle. Defendant entered a plea of guilty to transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)) in exchange for dismissal of the remaining counts.¹ On March 28, 2007,

¹ Health and Safety Code section 11360, subdivision (a) provides, in relevant part, as follows: "[E]very person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be

the court suspended imposition of sentence and granted Proposition 36 probation (Pen. Code, § 1210 et seq.) for a term of three years.

Over the course of the next year and a half, defendant violated Proposition 36 probation three times, twice by testing positive for marijuana and then by driving on a suspended license. On July 30, 2008, the court terminated defendant's Proposition 36 probation. On September 10, 2008, the court sentenced defendant to the midterm of three years, suspended execution of sentence, and granted formal probation for a term of five years with defendant waiving presentence custody credit up to September 10, 2008. The court found that circumstances in aggravation and mitigation cancelled each other out.

On April 1, 2009, defendant admitted violating probation by testing positive for marijuana. On April 22, 2009, the court sentenced defendant to state prison for the "upper" term of "three" years, finding aggravating circumstances outweighed mitigating factors.

Defendant appeals. We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was

punished by imprisonment in the state prison for a period of two, three or four years."

advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a supplemental brief, raising an ineffective assistance of counsel claim in that counsel failed to pursue the compassionate use defense. Defendant claims he had been under the care of Dr. Cristal Dawn Speller since February 2007 and had received a renewed recommendation for medical marijuana on January 13, 2009, three months before his incarceration. Defendant attached Dr. Speller's statement pursuant to Health and Safety Code section 11362.5, dated January 13, 2009.

To establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Defendant's challenge to defense counsel's performance is based on evidence attached to his brief and does not appear in the record on appeal. Defendant is precluded from relying upon factual allegations outside the record. (Cal. Rules of Court, rules 8.360(a), 8.204(a)(1)(C); *Ingram v. City of Redondo Beach* (1975) 45 Cal.App.3d 628, 630.) Disregarding that portion of defendant's brief, defendant has failed to demonstrate that counsel's performance was deficient.

We note an error in sentencing. In granting formal probation after revoking Proposition 36 probation, the court imposed the midterm of three years, finding circumstances in

aggravation and mitigation cancelled each other out, and suspended execution of sentence. After defendant violated probation, the court resentenced him, finding aggravating circumstances outweighed mitigating factors and imposing the upper term of "three years." The sentencing triad is two, three, or four years. The abstract of judgment shows the "U[pper] term" of "3 YRS." The court erred in failing to impose the previously imposed sentence of the midterm of three years. The court lacked jurisdiction to increase the previously imposed sentence. (Pen. Code, § 1203.2, subd. (c); Cal. Rules of Court, rule 4.435(b)(2); *People v. Howard* (1997) 16 Cal.4th 1081, 1088.)

This court received a minute order dated February 2, 2010, in which the trial court recognized its error in imposing the "upper" term and ordered amendment of the abstract of judgment. The trial court labels the error of an upper term as a "misstatement." Because the trial court found factors in aggravation outweighed those in mitigation, rather than a misstatement it appears to be an error in sentencing. In any event, the amended abstract of judgment filed February 2, 2010, properly reflects the midterm of three years. Consequently, there is nothing for this court to do.

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without requesting supplemental briefing) of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitled him to

additional presentence credits. As expressed in the recent opinion in *People v. Brown* (2010) 182 Cal.App.4th 1354, we conclude that the amendments do apply to all appeals pending as of January 25, 2010. Defendant is not among the prisoners excepted from the additional accrual of credit. (Pen. Code, § 4019, subds. (b) & (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Consequently, defendant, having served 43 actual days of presentence custody, is entitled to 42 days of conduct credits. The court awarded defendant 43 actual days and 21 conduct days. Defendant is entitled to an additional 21 conduct days.

Having undertaken an examination of the entire record, we find no other arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is modified to provide for 21 additional conduct days, for a total of 85 days of presentence custody credit (43 actual and 42 conduct). The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy of said amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

RAYE, J.

We concur:

SIMS, Acting P. J.

CANTIL-SAKAUYE, J.